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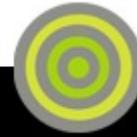
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April 2020

COVID-19: Small Businesses, Employment Laws, and Survival Support

"The secret of crisis management is not good vs. bad, it's preventing the bad from getting worse" (Andy Gilman)



We can only guess at how the COVID-19 coronavirus outbreak will end, but let's all take whatever concrete steps we can right now to lessen its impact on our personal lives, on our businesses, and on our country.

One of those steps is for businesses to find ways of continuing to operate as normally as possible, given of course the exceptional times we are living through. And as employers, many businesses will find themselves facing some novel challenges, particularly during the National Lockdown...

Small businesses – the new relief programs

A whole raft of support and relief programs has been announced. Some still need to be finalised and the situation is changing daily, so keep an eye on the media and

incorporate into your business survival plan all relief channels you think may be open to you. At date of writing, these are the main ones –

- The DSBD (Department of Small Business Development) will provide relief to businesses in several categories. Call the DSBD on its 0860 663 7867 hotline or email info@dsbd.gov.za to see if you qualify. Apply at <https://smmesa.gov.za/>.
- The DTI (Department of Trade and Industry) is set to provide relief for large businesses as well as small. Keep an eye on the DTI's [website](#) for developments.
- The Solidarity Fund has been set up with R150 million from the government to, amongst other things, assist and support those affected (contact details [here](#)).
- Employer and employee relief: Access the “Easy Guide for employers on COVID19” [here](#) and read up on the “Temporary Employer/Employee Relief Scheme” and UIF benefits from a special R30bn National Disaster Benefit Fund. Confirmation that employees who fall victim to the virus will be paid through the Compensation Fund - details [here](#).
- Other funds and relief measures: The Rupert and Oppenheimer families have pledged R1 billion each to help struggling small businesses and employees – the details are not available at date of writing. Read the President’s speech [here](#) for more on planned or implemented measures involving tax relief, changes to the Competition Act, a fund to support the tourism sector, and more.

Employers - comply with the law!

From a legal perspective, employers in particular need to have a solid action plan in place to ensure that they comply with all our many employment laws, which will continue to apply as is, unless and until government announces any new measures to the contrary.

Detailed planning will not be easy. **With the situation changing daily, keep informed of developments and keep all your plans flexible.**

In any event there is unfortunately no “one size fits all” answer to questions like “Can I dismiss an employee who tests positive for COVID-19?”, “Can my employees insist on working from home?”, “Can I start retrenching?”, “Can I prohibit employees from travelling abroad for personal reasons?”, “What steps must I take to ensure a safe working environment and what rules can I put in place to underpin them?”.

The list is endless and the answers to these questions will depend upon your Lockdown exemption status, your particular employment contracts, business circumstances, operational needs, and so on.

Your employee action plan

We need to get used to constant change and uncertainty, but **there are steps you can take now to plan for as many eventualities as possible -**

1. As a start, incorporate into your “COVID-19 Business Plan” all the possible scenarios you can think of, both during the National Lockdown and after it ends.
2. Then brainstorm – with your employees where you can - a list of all the employment-related problems you and they might face. Use that in turn to make a list of questions you will need the answers to under each scenario.
3. Then, **make sure you are fully prepared to deal with whatever may come your way by taking specific legal advice on each and every one of those questions.**

"The primary remedy therefore is an order for removal of the structure" (extract from the judgment below)



What can you do if your neighbour has started (or finished) building without the necessary municipal approvals?

In a nutshell, our courts will very probably assist you with a demolition order, as a recent High Court decision around a long-running property encroachment illustrates.

The 16 year saga of an encroaching garage

- A couple, owners of a property next to a church Mission, expanded their house in 2004 by building a brick garage.
- They thought they were building on their own land, having in 1998 built a wall along what they genuinely – but mistakenly – thought was the correct boundary between the two properties.
- As we shall see below, their fatal mistake was building their garage without municipal plans or approval.
- In fact the garage was inadvertently built on Mission land, but the Mission was having none of that -
 - First in 2012 it asked the couple – and another neighbour in the same position - to demolish.
 - When the couple refused (the other neighbour complied) the Mission in 2014 laid criminal charges against them for failing to comply with the relevant Act (the National Building Regulations and Building Standards Act). These charges, for purely technical reasons, failed to stick.
 - On pressed the Mission, this time turning to the local municipality for help in 2016. The municipality duly issued a formal Notice requiring demolition of the garage as it had been erected illegally without plans or permission. The couple simply refused to either receive the Notice or to remove the encroaching garage.
- Which brings us to the High Court in 2017, with the Mission applying for a demolition order and the couple asking the Court to rather order the Mission to transfer the relevant piece of its land to them against payment of reasonable compensation.

What about alternatives to demolition?

A court deciding a demolition application has “discretion to reach an equitable and reasonable solution in terms of the common law by ordering payment or compensation rather than removal in cases where the cost of removal would be disproportionate to the benefit derived from the removal”.

In this respect said the Court (emphasis supplied) “the encroaching owner’s own conduct plays an important role” and “while one is acutely aware of the financial implications, inconvenience and disruption which the partial demolition will cause the [couple], **the upholding of the doctrine of legality, a fundamental component of the rule of law, must inevitably trump such personal considerations.**”

Commenting on the couple’s “obstructive behaviour” in this case, and finding that they

“are indeed in legal and administrative breach of the law ... to allow them to keep the structures where they are, would be to perpetuate the illegality”, the Court ordered the couple to demolish their illegal garage within 90 days.

So if you are the neighbour planning to build...

Whilst the case in question deals with encroachment on another’s land, our courts have applied exactly the same principles to a wide variety of “neighbour dispute” cases – sea view obstructions, failure to observe building lines and the like.

So don’t even think of starting to build without having all necessary municipal plan approvals and permissions in place!

And if you are the objecting neighbour...

The couple in this case put up an argument that the Mission couldn’t demand demolition as it had “acquiesced in their occupation of the relevant land because it did not object when they built the wall on the church ground in 1998, and did not complain when they built the ‘offending’ garage in 2004 or 2005.”

Factually the Mission’s long history of actively objecting to the unlawful construction put an end to that argument, but the longer you delay in objecting and taking action the greater your risk of facing a similar argument. **Take immediate action against any neighbour building unlawfully.**

How to Stop an Ex-Director from Competing With You

“...the default position is that an executive director or a senior employee may not carry on business activities which fall within the scope of his company’s business during the time when he serves as director or works as employee. The default position however changes on resignation.”
(Extract from judgment below)



What happens if relations between you and your fellow company directors sour to the extent that a director leaves? Can he or she immediately open up a new business in direct competition to you?

A recent High Court decision both addresses that knotty question, and highlights a quick and easy solution.

Fishing for business: “Big Catch” claims R24m

- Big Catch Fishing Tackle (Pty) Ltd markets and hosts fishing and fly fishing tours in both local and international waters.
- The company’s two directors and shareholders fell out, culminating in one director accusing the other of serious breaches of his duties as director.
- Although hotly disputing any wrongdoing he resigned his directorship (under, he says, duress and coercion). He remains a shareholder.

- Big Catch is now suing the ex-director for some R24m in “past” and “future” damages, relying on disputed claims of improper or unlawful conduct which include the channeling away of business from Big Catch, misappropriating stock, diverting payment of commissions and acting recklessly and without authority. Whether or not these allegations will be proved eventually will only be determined when the main case finally goes to trial.
- What is of interest to us at this stage is Big Catch’s interim application to the High Court to interdict the ex-director and his new business (Upstream Fly Fishing) from competing with Big Catch.

Ex-director off the hook

- Directors have a range of fiduciary duties towards their companies. They must at all times act in good faith and in the best interests of the company. They must avoid conflicts of interest. They cannot compete with the company nor make secret profits. “The default position”, as the Court in this case put it, “is that an executive director or a senior employee may not carry on business activities which fall within the scope of his company’s business during the time when he serves as director or works as employee.”
- Big Catch had to convince the Court that those duties survive resignation unchanged. But, held the Court, that “default position” changes on resignation and “the director or employee does not commit a breach of his fiduciary duty merely because he takes steps to ensure that, on ceasing to be a director or employee, he can continue to make a living even by setting up a business in competition with his former company or by joining a competitor and then pursuing opportunities similar in nature to those targeted by his former company.”
- Although a director’s fiduciary duty does indeed survive departure, “the *content* of that duty does not remain the same ... **The duty will only be breached after resignation if it involves the use of confidential information or violates an interest of the company that is worthy of protection in some other way**” (emphasis supplied).
- In other words, a company cannot simply say “our ex-director is breaching an ongoing fiduciary duty towards us”, it must go further and actively prove a right to protection. Big Catch in this case being unable to make out its case, the Court dismissed the application with costs and the ex-director is off the hook, at least for now.

Big Catch’s big mistake – no restraints of trade

Round 1 therefore to the ex-director; a victory made easier by Big Catch’s failure to put restraints of trade in place for all its directors and senior employees.

As the Court put it “...in the absence of a restraint of trade, the onus shifts to the director’s former company to justify the interdict both in law and in fact” and “...a company that wishes to prevent a director or employee from competing with it after resignation should either do so by way of imposing a reasonable restraint of trade or it will have to persuade a Court that it has an interest worthy of protection, such as confidential information, client lists or connections, that justifies an interdict.”

Bottom line – make protecting your company easy with restraints of trade!

Beware the “Common Law Marriage” Myth

“In our law cohabitation does not have special legal consequences. Generally the proprietary consequences and rights flowing from a marriage are not available to unmarried couples, regardless of the length of their cohabitation” (extract from judgment below)



If you live as a couple, avoid the trap of believing the myth of the “common law marriage”. It’s a very persistent myth, possibly because some other countries do indeed give formal recognition to certain forms of life partnership.

But not in South Africa - there is no such thing in our law as a “common law marriage”. No matter how long you have lived together, if you break up or when one of you dies, neither of you automatically has any of the rights and protections afforded to a couple in a marriage or civil union.

Apart from the personal consequences the financial downsides can be huge, and our courts are all too often faced with sad and bitter disputes which end with one of the partners destitute and homeless after decades of cohabitation.

A recent High Court case highlights the financial dangers...

22 years on, a couple splits

- For most of 22 years, with only a short early separation, a man and woman “in a romantic relationship” lived as a couple, in a household complete with the woman’s daughter from a previous relationship.
- They had been jointly involved to one degree or another in a series of business ventures including vegetable farming (on a farm purchased in the man’s name), commercial blasting, a bakery and a packaging business, and what was at stake in the High Court was whether the woman could prove her claim to a 50% share of the resultant assets.
- The facts were bitterly disputed, with the man adamant that the relationship had been nothing more than co-habitation as lovers. But eventually the Court concluded, on the basis of the facts that it found proved, that “the parties intended to pool their resources for the benefit of a joint estate” and that the woman had accordingly proved the existence of a “universal partnership”.
- Not however to the 50/50 extent she claimed, and the end result is that at age of 47 and after 22 years she leaves the relationship with only 30% of the net assets. Hard though that may seem, she could easily have been left with nothing, as we shall see below when we look at what our law says about such relationships.

The difficulty of proving a “universal partnership”

The problem in such a case is that you have to prove a lot more than just cohabitation.

You also need to prove the existence of a “universal partnership” and that, as many cases in the past have illustrated, is not easily achieved, not least because the onus is on you to prove your case. You will need to prove all of the following -

1. Each of the parties brought something into the partnership, or bound themselves to bring something into it, whether it be money or labour skills;
2. The business had been carried on for the joint benefit of both parties;

3. The object was to make a profit; and
4. The partnership contract was legitimate.

If, as is common in this sort of situation, you rely on a “tacit” agreement (an unexpressed agreement inferred from your actions as a couple), you have to go further and prove that –

5. The other person was fully aware of the circumstances connected to the transaction;
6. The act relied upon was unequivocal; and
7. The tacit contract does not extend beyond what the parties contemplated.

Again, not easily proved, as “A tacit contract will be interpreted strictly and not extensively, since a contract must be interpreted in favour of the person on whom it is sought to place an obligation.”

The good news - there's a simple solution...

We have talked above only about the financial consequences of life partnerships which are unregulated by agreement. But formal marriage also provides a range of other legal benefits and protections (such as rights of inheritance and support and other personal aspects of your relationship) which are not automatically available to you.

Fortunately you can avoid all the risk and uncertainty of an unregulated relationship with a quick and simple solution - a formal cohabitation/life partnership agreement.

Just be sure to get it in place early on. **Take professional advice (jointly – this is to protect you both!) as soon as you commit to a long-term relationship.**

Website of the Month: COVID-19 - Entrepreneurs and Your Growth Opportunities

“Never let a good crisis go to waste” (Winston Churchill)

The COVID-19 coronavirus crisis will, like all crises, eventually give way to economic and societal recovery.

Even before that inevitable upturn actually sets in, entrepreneurs should remember that **times of great risk and challenge are also times of great opportunity**. So get your team together now and brainstorm what new needs and new niches you can fill. Witness for example the “remote destination” businesses like game lodges now offering safe and luxurious havens for those wanting to self-isolate and to practice social distancing far from the city hotspots. **That’s a win-win for everyone – businesses, their employees, their clients, and their suppliers.**

And when a sustained recovery does make its welcome appearance, make sure that you are way ahead of the pack by using this current time of fear and negativity to maximise your planning. What will the recovery look like? How will you take advantage of it? What staff and resources will you need?

Get off to a good start with “Growth opportunities for small business in SONA and the



Budget” on the Catalyst Magazine [website](#) which highlights some of the many opportunities still open to businesses big and small –

- The Infrastructure Fund
- The Tourism Equity Fund
- The African Continental Free Trade Area
- Incentive Programmes For Small Businesses.

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